

Editorial note

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HOW COMMON ARE THE VALUES OF THE EUROPEAN UNION?

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. *These values are common to the Member States* in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

1 Europe's values: the rise to prominence

When the foundational principles or values of the European Union were penned down in Article 2 of the Treaty of Lisbon, they seemed to be rather self-evident, and the *conventionnaires* in the constitutional convention that first drafted the provision as well as the Member States in the consecutive Intergovernmental Conferences rallied around them without too much discussion.¹ Many commentators at the time considered Article 2 TEU to be little more than a political and symbolic provision, despite its formal foundational character.² The main bone of contention during the convention was whether or not the Preamble to the Constitutional Treaty should contain a reference to Europe's Christian heritage, which was eventually left out. With respect to what is now Article 2 TEU, there was broad consensus on the more political values of 'freedom, democracy, respect for human rights and fundamental freedoms and the rule of law'. There was less agreement, however, on the inclusion of 'ill-defined notions' such as solidarity and equality which, according to the President of the convention, would be hard to enforce. In the end, a compromise was found to distinguish between the founding values of the Union (human dignity, liberty, democracy, the rule of law and respect for human rights), and more societal values (tolerance,

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¹ On the drafting process, see Alain Pilette and Étienne de Poncins, 'Valeurs, objectifs et nature de l'Union' in G Amato, H Bribosia and B De Witte (eds), *Génèse et destine de la Constitution européenne* (Bruylant 2007); on the genesis of the provision, see also Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 110-117.

² On the values proclaimed in Article 2 TEU as 'foundational principles', see Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16(2) *European Law Journal* 95.

equality and solidarity). The IGC would add to the proposal of the convention the values of pluralism, justice and non-discrimination. In the final Lisbon version, ‘liberty’ was exchanged for ‘freedom’, and ‘equality’ for ‘equality between men and women’.

Article 2 TEU was broadly considered to be confirmation of a factual situation, describing the type of regime the European Union was and is to be, as well as the type of societies it seeks to govern: the Union is modelled after the example of its Member States, a democratic system governed under the rule of law, that respects human rights, and governs societies that cherish pluralism, tolerance and equality. It was, in a sense, an expression of the self-perception of the Union, a description of its identity. Today, the picture is very different. The values mentioned in Article 2 TEU have come to play a prominent role in the public discourse on European integration. They are mobilised in an unprecedented manner, both by the European Union and its Member States, including those that allegedly infringe them.³

2 ‘Common’ no longer: values under siege

At the same time, infringements of these values seem to be rising, and the EU institutions have begun to act in order to protect them.⁴ The Article 7 TEU procedure – long considered the nuclear option and not to be used in reality – has been opened against two Member States.⁵ Article 2 TEU has also made it to the case law of the Court of Justice of the European Union, despite the fact that many originally believed that they were non-justiciable and that safeguarding them would be entrusted to the political bodies and the Member States.⁶ The CJEU now draws on them when interpreting EU law, and has operationalised Article 2 TEU

³ On increasing references to ‘European values’, their appropriation by diverse groups of actors and their impact on public action, see François Foret and Oriane Calligaro (eds), *European Values: Challenges and Opportunities for EU Governance* (Routledge 2018).

⁴ There is an abundant literature recounting the developments in Hungary, Poland and other countries. See, among many others: A von Bogdandy and Pal Sonnevend, *Constitutional Crisis in the European Constitutional Area Theory, Law and Politics in Hungary and Romania* (Hart 2015); C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (OUP 2017); Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019); and the many blogposts and newspaper and journal articles on the issue.

⁵ The European Parliament adopted its Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union (TEU), the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. Hungary has, by the way, challenged the validity of the resolution. See Case C-650/18 Hungary v European Parliament (pending).

⁶ See, eg, Opinion 2/13; Case 64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.

by qualifying Article 19 TEU as giving expression to the values of rule of law in Article 2 TEU.⁷ The Commission has begun to bring enforcement actions against Member States for infringements of the Charter of Fundamental Rights, something it has resisted for a long time.⁸

More generally, we are witnessing a decline of compliance with the values of democracy, rule of law and the protection of fundamental rights throughout Europe. Europe is not spared from the global retreat from democracy and rule of law.⁹ The same is the case for the infringement of fundamental rights. In several countries, the problems go well beyond the occasional infringement of fundamental rights or reasonable disagreement on what these values require in specific cases. Systematic infringements of the ECHR and, more importantly, defiance of the judgments of the ECtHR are not exceptional.

More worrying even than the increased violations of the foundational values is the fact that the Article 2 TEU values – and I here limit myself to democracy, rule of law and fundamental rights – are no longer self-evident. They no longer go unchallenged.¹⁰ In a growing number of circles the values of Article 2 TEU are openly challenged. Conceptions on democracy, rule of law, fundamental rights and liberty as well as the relations between them are changing across Europe (and worldwide, for that matter). Democracy, for instance, is more and more seen as rule by the majority, neglecting or denying the rights of minorities, while compromise is increasingly considered a sign of weakness. Trust in the media, (certain) universities, (foreign) NGOs, courts and independent agencies – all of which are essential in well-functioning constitutional democracies – are under siege. Even long-standing democracies are shaken by populist political forces.¹¹

When it comes to the rule of law, courts and judicial systems have been targeted in many countries. There is a trend of challenging courts as counter-majoritarian bodies, and their decisions are increasingly viewed as illegitimately interfering with the political. One need only re-

⁷ *Associação Sindical dos Juizes Portugueses* (n 6) para 32; Case C-619/18 *Commission v Poland*.

⁸ Mark Dawson and Elise Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 CML Rev 751 and 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' (2013) 14 GLJ 1959.

⁹ See, eg, Freedom House, *Democracy in Retreat: Freedom in the World 2019*, available at <<https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat>> accessed 29 November 2019.

¹⁰ See, eg, Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018); J Rupnik, 'The Crisis of Liberalism' (2018) 29 Journal of Democracy 24; Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (Encounter 2016).

¹¹ Cas Mudde, *The Far Right Today* (Polity 2019).

call the headlines in some British newspaper when the Supreme Court handed down its decision in *Miller*, speaking of the 'enemies of the people', or, even more worrying, the reaction of Trump to judicial decisions that get in the way of his policies.

Likewise, human rights are no longer self-evident and are seen as 'leftist hobbies', as instruments in the hands of identity or minority groups using the court rooms to interfere with political decisions in sensitive and societally divisive issues.¹² The courts protecting and enforcing human rights are accused of interfering with politics, or, when it comes to European courts, with the sovereignty of nation states.

These trends which exist everywhere in Europe seem to gain more traction in the new democracies in East Central Europe. It is well known that Orban has openly declared that he is striving for alternative values, has openly disavowed liberalism,¹³ and stated that 'the era of liberal democracy is over'.¹⁴ The attack on the rule of law seems to be amplified in East Central Europe, where 'law' and the 'rule of law' have for a long time been viewed with suspicion in the first place.¹⁵ It should come as no surprise that the 'rule of law' is not always automatically embraced.¹⁶

At the same time, and perhaps surprisingly, the relevant regimes usually do not disavow the language of democracy, rule of law and fundamental rights even if they sometimes explicitly disavow liberalism and the protection of specific rights and specific groups of people, and they remain eager to be recognised as proper (or even the only 'true') democracies.¹⁷ They retain institutions and procedures which are commonly as-

¹² In the US, a Commission for Unalienable Rights was established in order to reconsider human rights and return to their true meaning, which in the words of Mike Pompeo should lead to distinguish 'veritable' unalienable rights and 'ad hoc rights granted by governments'. A letter in response to this commission asking for it to be disbanded, signed by 400 NGOs and former senior government officials, can be found at <www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf> accessed 29 November 2019.

¹³ On that concept, see, eg, Andras Pap, *Democratic Decline in Hungary Law and Society in an Illiberal Democracy* (Routledge 2018); critical of the concept: Jan Werner Muller, 'Democracy' Still Matters' *The New York Times* (New York, 5 April 2018). The concept was coined by Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22 to denote regimes that combine the presence of free and fair elections with the absence of constitutional liberalism.

¹⁴ Marc Santora and Helene Bienvenu, 'Secure in Hungary, Orban Readies for Battle with Brussels' *The New York Times* (New York, 11 May 2018).

¹⁵ See, eg, the contributions in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-communist Legal Orders* (Springer 2006).

¹⁶ See, eg, Martin Mendelski, 'Europeanization and the Rule of Law: Towards a Pathological Turn' (2016) 40 *Southeastern Europe* 346; and his 'The Rule of Law' in Adam Fagan and Petr Kopecký (eds), *The Routledge Handbook of East European Politics* (Routledge 2017) ch 8.

¹⁷ Orban claims to be the only real defender of Christian democracy, which he opposes to liberal democracy. See, eg, Marc Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30(1) *Journal of Democracy* 5.

sociated with robust constitutional democracies: constitutional courts, judicial councils, elections, political rights, even if they restrict the media, capture the judiciary, and repress civil society, thereby rendering elections neither free nor fair, even if there is no ballot stuffing on the day of the vote). But these bodies have to a large extent been captured by the ruling parties, and no longer perform their functions as should be the case in robust liberal democracies governed under the rule of law.

3 Are these values really ‘common’?

The values mentioned in Article 2 TEU are not just *European* values: they are also considered to be values that are *common* among the Member States. The fact that the values are considered common is important and serves several purposes. *First*, it links European fundamental values to *those of the Member States*, thus ensuring continuity. Membership of the Union does not entail a breach with national fundamental values, especially those which are in many states considered to belong to the ‘constitutional identity’ (understood as the immutable core of the constitution): democracy, respect for fundamental rights, rule of law, liberty. Indeed, many Member States’ constitutions explicitly declare their foundational values or principles, often including the principles of rule of law, democracy and respect for fundamental rights, the principle of sovereignty, a reference to the form of government (republic, unitary or federal), and most often in the opening articles of the Constitution. These are often considered to form the immutable core or the ‘identity’ of the Constitution, often protected against constitutional amendment. The values that the Union is based on according to Article 2 TEU are in fact very similar to those that the Member States are based on.

The reference to *common* values is also an expression of the fact that the Member States are *like-minded* nations (to use the phrasing of the ECHR), which adhere to the same values, and which distinguish them from other states which may not. The reference is then, to use the vocabulary of the Venice Commission, to a ‘European constitutional heritage’. It is thus a statement, so to speak, of the European identity as a common identity: the European Union and its Member States stand for these values, and this is what distinguishes them from other states.

4 Or are they Western values?

But are the common European values really common? Or are they really Western values, originating in the Western European Member States which are now being imposed on East Central European countries?

It is a fact that the foundational values of the Union and the conditions for membership were expressed rather late in the process of Eu-

ropean integration, in the wake of the accession of the post-communist states. When ‘values talk’ really took off in the European Union in the 1990s and early 2000s, one of its aims was to make explicit the implicit values that had always been presumed common to the European Union and shared among its members, and which distinguished the EU from other parts of the world. Europe had been searching for its soul and a narrative to explain its *raison d’être* to its citizens, to the Member States and to the outside world, but little had been achieved.¹⁸ In the early 1970s, in the midst of the Cold War, the Member States of the European Communities did try to formulate a ‘European identity’, based on the values that they shared, and that they wanted to develop further, defend, and which they wanted to espouse in their relations to the world.¹⁹ But the values and principles that the Member States must be committed to in order to be able to join, the conditions for membership, were not well developed. There was rather a common, be it implicit, understanding of how constitutional liberal democracies are supposed to work.

The need to make the fundamental values and conditions for membership explicit became acute after the fall of the wall and in light of the imminent accession of former communist countries, states that had not been governed under these principles for a long time. They were formulated by the existing – Western – Member States of the Union in the Copenhagen political criteria for membership, on the basis of their experiences. When Article 2 TEU was drafted, the EU had 15 members, the states that are now referred to as the ‘Old Member States’ or the Old Europe, to distinguish them from the so-called New Member States joining in 2004, 2007 and 2013 (sometimes referred to as the ‘New’ or ‘the Other Europe’).

Yet, when the countries in East Central Europe sought accession, it was clear that they wanted to absorb those values that had first developed in the West. There was an expressed will of the East Central European and other candidate countries to ‘return to Europe’, and the majority in the East Central European States found it natural to model their own systems on Western European systems that they saw to be functioning successfully.²⁰ This is for instance expressed in the 1991 Visegrad Declaration²¹ and is evidenced by their accessions to the Coun-

¹⁸ On the history of the conditions for membership and political conditionality until the 1970s, see Ronald Janse, ‘The Evolution of the Political Criteria for Accession to the European Community, 1957–1973’ (2018) 24(1) ELJ 57.

¹⁹ Copenhagen Declaration 1973.

²⁰ See Wojciech Sadurski, ‘EU Enlargement and Democracy in the New Member States’ in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-communist Legal Orders* (Springer 2006) 29.

²¹ Declaration on Cooperation between the Czech and Slovak Federal Republic, the Republic of Poland and the Republic of Hungary in Striving for European Integration, 15 February 1991.

cil of Europe and ODHIR. The acceding Member States *chose* to join organisations that would demand compliance with the values of democracy, rule of law, respect for fundamental rights and minorities, pluralism and tolerance.²² Importantly, the values to be absorbed in the context of accession were not presented as those of the EU-15 or of one or more of the Old Member States, but as *European* values. The notion of ‘common constitutional principles’ and European values may indeed once have been modelled after Western European traditions, but they were meant to be shared and shaped also by the New Member States.

Nevertheless, the chosen process of returning to Europe was essentially a process of imitating the West. It was perceived by many – and perhaps even more so today – as a process of ‘absorbing imposed Western values’, which are not necessarily shared on the ground in the new Member States. As Krastev and Holmes have put it:

What makes imitation so irksome is not only the implicit assumption that the mimic is somehow morally and humanly inferior to the model. It also entails the assumption that Central and Eastern Europe’s copy-cat nations accept the West’s right to evaluate their success or failure at living up to Western standards. In this sense, imitation comes to feel like a loss of sovereignty.²³

Moreover, the process of Europeanisation in itself did not always comply with the principles to be adopted: the *acquis* as such was non-negotiable, and the candidate Member States, their parliaments and voters had only a limited say over the substance of the legislation they were required to transpose into their national system. This also included social legislation for which there was little support in society, including legislation protecting common European values, such as equality. As Krastev has noted, ‘The European Union and the external constraints that it imposed on the accession countries contributed to the perception of the transition regimes as “democracies without choices”, and thus fueled the current backlash against consensual politics.’²⁴ The process by which the common values were introduced did not fully respect these values in the candidate states.

The choice was not necessarily made *by all* in the post-communist countries. The process of ‘Europeanisation’ can be seen as an effort by

²² As is also emphasised by the CJEU in Case C-619/18 *Commission v Poland (retirement of Supreme Court Judges)* para 42: ‘the European Union is composed of States which have *freely* and *voluntarily* committed themselves to the common values referred to in Article 2 TEU’ (emphasis added).

²³ Ivan Krastev and Stephen Holmes, ‘Imitation and Its Discontents’ (2018) 29(3) *Journal of Democracy* 117.

²⁴ Ivan Krastev, ‘The Strange Death of the Liberal Consensus’ (2007) 18(4) *Journal of Democracy* 56, 59.

domestic post-communist reformers to import liberal-democratic institutions, adopt Western political and economic frameworks, and publicly embrace Western values, in view of accession and literally becoming part of Europe.²⁵ But it also caused serious rifts in their societies, and winners and losers of change.²⁶

It should come as no surprise, then, that the post-1989 settlement has – with all it has achieved – also contributed to creating a sense of resentment, against the domestic liberal elite that made the choice for a return to Europe, and against the EU as the embodiment of Western liberal values. The appeal of (Western) liberal democratic values in East Central Europe is declining, if only because the Western liberal-democratic states are facing their own internal crises in the form of rising populism and general discontent with the elites. Be that as it may, this may explain why East Central Europeans may now feel that they are now being judged by standards that are not their own, and which they do not necessarily agree with. They question liberal values and formulate alternative ‘ideologies’, thus denying that ‘Western’ values such as those expressed in Article 2 TEU as understood by the EU and the Old Member States provide the model to which all societies must conform.

5 Common values, national identity and exclusive competences of the Member States

This raises the question whether the Union should allow for diversity when it comes to compliance with the foundational values. It has been argued that the EU should not interfere with these issues which essentially pertain to national sovereignty, and that it should accept that Member States differ also in their understanding of the fundamental values. The interference of the Union in these matters, then, is challenged on two grounds: *lack of competence* and *failure to respect national identities*.

The first claims that the constitutional set-up of the States belongs to the exclusive competences of the Member States and that the EU should not meddle in sovereign affairs. Thus, for instance, in the infringement actions concerning the Supreme Court and the retirement of judges, the Polish Government argued that the organisation of the national justice system pertains to the competences reserved exclusively to the Member States and that the EU cannot arrogate competences in that domain.²⁷

²⁵ Ivan Krastev, ‘The Metamorphosis of Central Europe (2019) Project Syndicate, 21 January 2019.

²⁶ See, eg, John Feffer, *Aftershock. A Journey into Eastern Europe’s Broken Dreams* (Zed Books 2018).

²⁷ Case C-619/18 *Commission v Poland* (Supreme Court) judgment of 24 June 2019, para 38; Case C-192/18 *Commission v Poland* (retirement of judges) judgment of 5 November

The Court of Justice swiftly rejected that claim with reference to its settled case law that even when exercising reserved competences the Member States still have to comply with their obligations under EU law, including Article 19 TEU, which ‘gives concrete expression to the value of the rule of law affirmed in Article 2 TEU’. All Member States must therefore always comply with the obligation to ensure that the courts and tribunals which may be called upon to act as European judges are independent. The fact that, generally speaking, the organisation of the judiciary indeed belongs to the powers reserved to the Member States does not prevent the Court of Justice from reviewing that EU law is complied with. In this case, the Court could interfere because the Court interpreted Article 19 TEU as giving concrete expression to the value of rule of law laid down in Article 2 TEU. One may wonder whether the Court would also be able to interfere in other instances of reserved competences, where a State acts in defiance of Article 2 TEU, and where there is no parallel to Article 19 TEU giving concrete expression to the values of Article 2 TEU.

The second ground focuses on the diversity between the Member States and the duty imposed on the Member States to respect the national identities of the Member States. Thus, in its White Paper on the Reform of the Judiciary, the Polish Government extensively referred to Article 4(2) TEU to defend its right to introduce its own sovereign institutional solutions concerning the judiciary.²⁸ ‘The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities’, the Government claimed. Yet, even so, even the Polish Government admitted in the next sentence that:

This is not to say that Article 7 of the Treaty on European Union does not apply to judicial reforms in the Member States. Violation of judicial independence is a red line that cannot be crossed when it comes to the principle of the rule of law understood as an element of European values.

This seems to be the correct approach. There has always been a lot of room for variation in the constitutional structures of the Member States, and we see this in practice. National systems vary widely in the design of the state: some are monarchies, other republics, some are centralised, others are federal or regionalised, some have a constitutional court safeguarding constitutional rights, and others do not; they differ in terms of their judicial systems, the appointment of judges, the voting system, and so forth. This may be referred to as the principle of constitutional indif-

2019, para 93.

²⁸ Para 176.

ference or constitutional agnosticism of the EU: to a large extent, the EU is indifferent to the constitutional structures of the Member States. And in the exercise of its competences, the EU must under Article 4(2) TEU respect these structures, which may be seen as expressing the national identities of the Member States and must always comply with the values of Article 2 TEU.²⁹

European Union law thus allows for a lot of national diversity in the institutional structures of the Member States, and it accepts wide diversity in the organisation of the judiciary. But it does not accept such diversity with respect to compliance with the foundational values of Article 2 TEU. Compliance with the foundational values may take different shapes, and it is first and foremost a matter for the Member States who in principle retain exclusive competence in these matters, resulting in great variation among the Member States in terms of constitutional and political structures. But despite this variation, all must at the end of the day comply with the common values of Article 2 TEU and it is a matter of common concern that they are indeed complied with. So, variation is possible as to the form, but not in terms of substance.

This is where the challenge ahead lies: to define what the concrete standards are by which the diverging national institutional structures are to be measured, especially when the link with EU law is tenuous, and where there is little agreement on common standards. The *Rule of Law Review Cycle* proposed by the Juncker Commission in the summer of 2019 may well provide a framework to make the values more concrete and operational.³⁰ It is to be hoped that the von der Leyen Commission takes up the gauntlet.



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²⁹ Note that Article 4(2) TEU refers to national identities 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The provision is formulated as referring to *structural* principles and institutional design, rather than to societal or cultural values, as is often thought.

³⁰ Commission, 'Strengthening the rule of law within the Union. A blueprint for action' (Communication) COM(2019) 343 final.